

IN THE SUPREME COURT OF MISSOURI

Economy Forms Corporation	)	
	)	
Respondent	)	
	)	No. SC83385
v.	)	
	)	
J. S. Alberici Construction Co., Inc.	)	
	)	
Appellant	)	

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APPEAL FROM THE CIRCUIT COURT OF  
ST. LOUIS COUNTY, MISSOURI, DIVISION 10  
THE HONORABLE KENNETH M. ROMINES, CIRCUIT JUDGE

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RESPONDENT'S SUBSTITUTE BRIEF

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## **JURISDICTIONAL STATEMENT**

This is an appeal from a judgment of the Circuit Court of St. Louis County, in a civil action for breach of a Lease Agreement in which Plaintiff/Respondent Economy Forms Corporation sought to recover damages from Defendant/Appellant J. S. Alberici Construction Co., Inc. for attorney's fees and costs incurred by EFCO to defend a claim for personal injuries filed by Alberici's employee arising out of the use of concrete forms leased to Alberici by EFCO. The Circuit Court granted EFCO's Motion for Summary Judgment, and entered judgment in favor of Respondent for \$412,198.88 plus costs on February 10, 2000.

Alberici appealed this judgment to the Court of Appeals for the Eastern District of Missouri. The Court of Appeals issued its opinion reversing and remanding the judgment of the Circuit Court. EFCO's timely Motion for Rehearing or for Transfer was denied by the Court of Appeals. This Court granted EFCO's Application for Transfer on March 20, 2001. This Court has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution and pursuant to Supreme Court Rule 83.04.

## **STATEMENT OF FACTS**

Respondent Economy Forms Corporation ("EFCO") is a corporation with its principal place of business in Iowa (LF v.1, p.45). EFCO's forms are made of steel in modular sections that can be shipped to a job site and bolted together for use (LF v.1, p. 22). After the concrete is poured, the forms are disassembled and then shipped back to EFCO for reuse (LF v.1, pp. 22-23).

Appellant J. S. Alberici Construction Co., Inc. ("Alberici") is a Missouri Corporation engaged in business as a construction contractor (LF v.1, p.17). Alberici has been in business for approximately 80 years (LF v.1, p.122). It is one of the top construction firms in the United States (LF v.1, p.122). Alberici had done business with EFCO on other projects prior to this one (LF v. 1, p.123).

In 1989, Alberici was performing a project for renovation of the Mart Building in the City of St. Louis (LF v.1, p.17). Joseph Krispin, an Alberici Vice President, was the Project Manager in charge of the Mart Building project (LF v.1, p.22). Mr. Krispin's duties included seeking out projects, bidding on them, and supervision of the projects (LF v.1, p.122). His projects varied in size from between \$30 million up to \$150 million (LF v.1, p.122).

On September 29, 1989, Alberici entered into a contract with EFCO to lease several concrete forms (LF v.1, p.6). The contract, entitled "Economy Forms Corporation Lease Agreement" (hereinafter referred to as the "Lease Agreement") is attached hereto as an Appendix to this Brief (Resp. p.A1). The Lease Agreement was

signed by Mr. Krispin in his capacity as Vice President of Alberici (LF v.1, p.115). The Lease Agreement is a single sheet of paper printed on both sides (LF v.1, p.23). Directly above Mr. Krispin's signature the Lease Agreement states:

"This Agreement is subject to all provisions and conditions on the reverse side including limiting warranties."

The reverse side of EFCO's Lease Agreement consists of additional terms. One of those terms is as follows:

"14. **LIABILITY.** Lessee shall be entirely responsible for and shall pay and exonerate Lessor from liability for damages arising from injury to any persons or property as the result of the use or possession of the Leased Equipment by Lessee, its agents, employees, sub-contractors or any others after its delivery by Lessor and until its return to Lessor's possession. Lessee shall also indemnify, defend and save harmless the Lessor from any such claims, founded or unfounded, and whether based upon alleged negligence or otherwise." (App. p.A2).

On December 27, 1989, an Alberici employee, Christopher Stawizynski (hereinafter "Stawizynski"), fell and was injured while disassembling EFCO's concrete forms at the Mart Building project (LF v.1, p.19). In 1994, Stawizynski brought a negligence and products liability suit (hereinafter referred to as the Stawizynski suit") against EFCO and five other defendants, seeking damages for his injuries arising out of his use of the EFCO forms (LF v.1, pp. 66-111). On November 27, 1995, EFCO, pursuant to the Lease Agreement, requested that Alberici defend and indemnify EFCO

against the Stawizynski suit (LF v.1, p.112). On December 7, 1995, Alberici's insurance carrier, AETNA, acknowledged receipt of the November 27, 1995 tender of the defense of the Stawizynski suit (LF v.1, p.114). On January 5, 1996, Cheryl Meers, Claim Representative of Aetna, by letter rejected EFCO's request for defense against Stawizynski's suit (LF v.1, pp.47-48).

On July 1, 1998, the Stawizynski suit was resolved in favor of EFCO by jury verdict that found Alberici's employee to be 100% at fault for his injuries (LF v.1, p.48). On October 15, 1998, Joseph Michels, Vice President of EFCO, renewed his request to Alberici to pay EFCO's defense costs (LF v.1, p.48). EFCO spent \$383,941.26 on legal fees and expenses in defending the Stawizynski suit (LF v.1, p.48). On November 18, 1998, Alberici through its insurance carrier again declined to pay the defense costs of EFCO (LF v.1, p.48).

Thereafter, EFCO filed suit against Alberici in February 1999 (LF v.1, p.58). On November 9, 1999, EFCO filed its First Amended Petition (LF v.1, p.6). EFCO sought to recover the attorney's fees and expenses it paid to defend the Stawizynski suit due to Alberici's breach of the duty to defend clause in Paragraph 14 of the Lease Agreement (LF v.1, p.8). After the First Amended Petition was filed, both parties filed Motions for Summary Judgment (LF v.1, p.16, LF v.1, p.45). In support of its Motion for Summary Judgment, Alberici filed the affidavit of its Vice President, Joe Krispin (LF v.1, p.18). Mr. Krispin stated that he looked at the front side of EFCO's Lease Agreement to verify that the blanks were correctly filled in by EFCO (LF v.1, p.18). Krispin further stated that, "I did

not read the printed terms on the back side because I did not consider EFCO's product warranties to be very important to Alberici" (LF v.1, p.23).

The Motions for Summary Judgment were argued before the Trial Court and submitted on January 11, 2000, and on February 10, 2000, the Trial Court entered its "Judgment and Order" granting summary judgment in favor of EFCO and against Alberici for damages totaling \$412,198.88 (LF v.3, pp. 54-59). Alberici filed its appeal of this decision to the Court of Appeals for the Eastern District. The Eastern District issued its Opinion on November 28, 2000, reversing and remanding the Trial Court's decision. EFCO timely filed its Motion for Rehearing or for Transfer which was denied by the Eastern District Court of Appeals on February 1, 2001. EFCO timely filed its Application for Transfer with this Court, and this Court granted its Motion and ordered the matter transferred on March 20, 2001.

## POINTS RELIED ON

### I.

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO PLAINTIFF EFCO AWARDING EFCO ITS COST OF DEFENSE OF THE STAWIZYNSKI SUIT BECAUSE PARAGRAPH 14 OF THE LEASE AGREEMENT REQUIRED ALBERICI TO DEFEND EFCO FROM CLAIMS OF PERSONAL INJURY, FOUNDED OR UNFOUNDED, AND WHETHER BASED UPON ALLEGED NEGLIGENCE OR OTHERWISE, ARISING OUT OF ALBERICI'S USE OF THE FORMS BECAUSE BOTH PARTIES TO THE LEASE AGREEMENT WERE SOPHISTICATED COMMERCIAL ENTITIES THAT AGREED TO THESE TERMS, THE TERMS WERE SUFFICIENTLY CLEAR AND CONSPICUOUS, AND BECAUSE THE JURY FOUND THAT EFCO WAS NOT AT FAULT.

Alack v. Vic Tanny Intern. of Missouri, Inc., 923 S.W.2d 330 (Mo. 1996).

Malan Realty Investor's, Inc. v. Harris, 953 S.W.2d 624 (Mo. 1997).

Monsanto Company v. Gould Electronics, Inc., 965 S.W.2d 314 (Mo. App. E.D. 1998).

L.K. Wood v. Safeco Insurance Co., 980 S.W.2d (Mo. App. E.D. 1998).

## II.

**THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO EFCO BECAUSE PARAGRAPH 14 OF THE LEASE AGREEMENT WAS SUFFICIENTLY CONSPICUOUS IN THAT IT IS CONTAINED IN A TWO PAGE CONTRACT, SUFFICIENTLY DISTINGUISHED IN BOLD AND CAPITAL LETTERS, AND THE LEASE AGREEMENT WAS EXECUTED BY ALBERICI'S VICE PRESIDENT WHO WAS PRESUMED TO HAVE READ AND AGREED TO ALL PROVISIONS, AND ALBERICI'S CONDUCT UPON RECEIPT OF THE TENDER OF DEFENSE IS CONSISTENT WITH THE FACT THAT IT HAD AGREED TO ALL PROVISIONS OF THE LEASE AGREEMENT.**

Warren v. Paragon Technologies Group, Inc., 950 S.W.2d 844 (Mo. 1997).

Burcham v. Procter & Gamble Manufacturing Co., 812 F.Supp. 947 (E.D. Mo. 1993).

### III.

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF EFCO BECAUSE PARAGRAPH 14 OF THE LEASE AGREEMENT REQUIRES ALBERICI TO DEFEND EFCO FROM ANY CLAIM, FOUNDED OR UNFOUNDED, AND WHETHER BASED UPON ALLEGED NEGLIGENCE OR OTHERWISE, EVEN THOUGH THE STAWIZYNSKI SUIT SOUGHT RECOVERY FOR A WORK-RELATED INJURY TO AN ALBERICI EMPLOYEE BECAUSE THE MISSOURI COMPENSATION LAW DOES NOT PROVIDE IMMUNITY TO ALBERICI AGAINST LIABILITY WHEN ALBERICI CONTRACTUALLY AGREED TO DEFEND EFCO IF AN ALBERICI EMPLOYEE WAS INJURED WHILE USING THE EFCO FORMS

Parks v. Union Carbide Corp., 602 S.W.2d 188 (Mo. banc 1980).

McDonnell Aircraft Corp. v. Hartman-Hands-Walsh Painting Co., 323 S.W.2d 788 (Mo. App. 1959).

#### IV.

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO EFCO BECAUSE ALBERICI CONTRACTUALLY AGREED TO DEFEND EFCO AND, THEREFORE, MISSOURI COMMON LAW INDEMNITY IN PRODUCTS LIABILITY CASES IS INAPPLICABLE AND FURTHER, ALBERICI FAILED TO ASSERT THE DEFENSE IN THE TRIAL COURT THAT UNDER MISSOURI LAW EFCO, AS A MANUFACTURER, HAD THE DUTY TO INDEMNIFY ALBERICI AGAINST PRODUCTS LIABILITY CLAIMS FOR EFCO'S PRODUCTS AND, THEREFORE, ALBERICI WAIVED ANY SUCH ARGUMENT.

Parks v. Union Carbide, 620 S.W.2d 188 (Mo. banc 1980).

Plank v. Union Electric Co., 899 S.W.2d 129, (Mo. App. E.D. 1995).

V.

**EFCO DOES NOT SEEK FOR THIS COURT TO CHANGE  
EXISTING LAW.**

Alack v. Vic Tanny Intern. of Missouri, Inc., 923 S.W.2d 330 (Mo. 1996).

Kansas City Power & Light Co. v. Federal Construction Corp., 351 S.W.2d 741  
(Mo. 1961).

Monsanto v. Gould Electronics, Inc., 926 S.W.2d 314 (Mo. App. E.D. 1998).

Gross v. Sweet, 400 N.E.2d 306 (N.Y. 1979).

## **ARGUMENT**

### **I.**

**THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO PLAINTIFF EFCO AWARDED EFCO ITS COST OF DEFENSE OF THE STAWIZYNSKI SUIT BECAUSE PARAGRAPH 14 OF THE LEASE AGREEMENT REQUIRED ALBERICI TO DEFEND EFCO FROM CLAIMS OF PERSONAL INJURY, FOUNDED OR UNFOUNDED, AND WHETHER BASED UPON ALLEGED NEGLIGENCE OR OTHERWISE, ARISING OUT OF ALBERICI'S USE OF THE FORMS BECAUSE BOTH PARTIES TO THE LEASE AGREEMENT WERE SOPHISTICATED COMMERCIAL ENTITIES THAT AGREED TO THESE TERMS, THE TERMS WERE SUFFICIENTLY CLEAR AND CONSPICUOUS, AND BECAUSE THE JURY FOUND THAT EFCO WAS NOT AT FAULT.**

- A. Alberici Contractually Agreed to Defend EFCO From Claims Of Personal Injuries As A Result Of The Use of The Forms By Mr. Stawizynski, Alberici's Employee**

The Trial Court properly granted summary judgment in favor of EFCO against Alberici inasmuch as Alberici had a duty to defend the allegations of the Stawizynski lawsuit against EFCO. The key provision at issue is again as follows:

"14. **LIABILITY.** Lessee shall be entirely responsible for and shall pay and exonerate Lessor from liability for damages arising from injury to any persons or property as the result of the use or possession of the Leased Equipment by Lessee, its agents, employees, sub-contractors or any others after its delivery by Lessor and until its return to Lessor's possession. Lessee shall also indemnify, defend and save harmless the Lessor from any such claims, founded or unfounded, and whether based upon alleged negligence or otherwise." (App. p.A2).

Although this suit is not one between an insurer and insured, indemnification clauses are nevertheless to be construed as contracts of insurance. Terminal Railroad Assn. v. Ralston Purina, 180 S.W.2d 693 (Mo. 1944). An insurer's duty to defend is broader than its duty to indemnify. Miller's Insurance Association of Illinois v. Shell Oil Co., 959 S.W.2d 864, 869 (Mo.App. E.D. 1997). Thus, an insurer has a duty to defend claims falling within the ambit of the policy even if it may not ultimately be obligated to indemnify the insured at all. Id. at 871.

In Lowell K. Wood v. Safeco Insurance Co., 980 S.W.2d 43 (Mo.App.E.D. 1998), the Court of Appeals held that an insured's duty to defend exists when the petition in the underlying action states some grounds of liability covered by its insurance policy. Butters v. City of Independence, 513 S.W.2d 418, 424 (Mo. 1974). In Wood, the court

held that one must compare "the language of the insured's contract and the allegations of the petition in the action brought by the person injured or damaged. If the complaint alleges facts which state a claim potentially within the policy's coverage, there is a duty to defend." In Wood, the prevailing party was represented by the same firm that currently represents Alberici.

Furthermore, to determine the meaning of an indemnification clause, the words and the clause must be given their plain ordinary meaning as found in a dictionary. Waterwiese v. KBA Constr. Managers, Inc., 820 S.W.2d at 579, 584 (Mo.App.E.D. 1991). In this case, the language in the indemnification provision requires Alberici to "exonerate [EFCO] from liability for damages arising from injury to any persons or property as a result of the use or possession of the leased equipment by [Alberici], its agents, employees, sub-contractors, or any others after its delivery by [EFCO] and until its return to [EFCO's] possession. The word "exonerate" is defined as "to relieve of a burden, obligation, etc.; to unload; or to free from a charge or the imputation of guilt." Webster's New World Dictionary 492 (2<sup>nd</sup> Collegiate Ed. 1984). Clearly, applying this definition to the "**LIABILITY**" provision requires Alberici to free EFCO from any liability for damages arising from any injury to any persons or property as a result of the use or possession of the leased equipment by Alberici or its employees. The basis of the Stawizynski suit was that he was injured while using the forms as an employee of Alberici working on the Mart project. Accordingly, that portion of the "LIABILITY" provision alone would require Alberici to defend EFCO in the Stawizynski suit.

However, the provision also provides that Alberici shall also indemnify, defend, and save harmless [EFCO] from any such claims, founded or unfounded, and whether based on negligence or otherwise. Undoubtedly, the terms of this provision clearly required Alberici to defend EFCO in the Stawizynski suit.

The instant case is strikingly similar to Monsanto Company v. Gould Electronics, Inc., 965 S.W.2d 314, 316 (Mo.App.E.D. 1998), wherein the Missouri Court of Appeals for the Eastern District analyzed language in a similar indemnity agreement between Monsanto and Gould. The particular provisions of the indemnity agreement provided that:

"...Buyer [Gould] shall defend, indemnify and hold harmless Monsanto...from and against any and all liabilities, claims, damages, penalties, actions, suits, losses, costs and expenses arising out of or in connection with the receipt, purchase, possession, handling, use, sale or disposition of such PCBs..."

Both Gould and Monsanto were sued for injuries allegedly stemming from the PCBs. Monsanto formally demanded indemnity from Gould which failed to respond. Later, after the case settled, Monsanto submitted its legal bills to Gould's insurance carrier. As here, Monsanto was not seeking indemnity for damages assessed on account of its own negligence. However, Gould subsequently refused to indemnify Monsanto which resulted in Monsanto filing suit against Gould for damages resulting from the defense of the litigation including attorney's fees, costs, and expenses. The trial court determined that

Gould had agreed to indemnify Monsanto for its own negligence.

On appeal, Gould asserted that such an agreement to be enforceable must provide notification that one party is indemnifying the other for its own acts of negligence in more than "general terms". Relying on the Supreme Court case of Alack v. Vic Tanny Intern. of Missouri, Inc., 923 S.W.2d 330 (Mo.banc 1996), the Monsanto court recognized that the Alack court had determined that an exculpatory clause of the contract between the health club and an individual member was not sufficiently clear and explicit to warn of the shifting of risk and was unenforceable. However, the Monsanto court noted that in a footnote in Alack, this Court had reserved the right to find such a clause effective if the parties involved were equally "sophisticated commercial entities" negotiating at arms length. Id. at 338 n.4.

Additionally, the court recognized that in a case involving a commercial lease, this Court held that courts should not interfere with a party's right to contract. Monsanto, 965 S.W.2d at 316, citing Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624, 627 (Mo.banc 1997). In Malan, the court found that an important factor in construing a contract is the "relative bargaining position" of the parties to prevent overreaching. Id. Accordingly, the Monsanto court concluded that a court is bound to enforce the contract as written if the contract terms are unequivocal, plain, and clear and there is no showing that the contract was procured by fraud, duress or undue influence. 965 S.W.2d at 316.

The Monsanto court determined that both Gould and Monsanto were sophisticated commercial entities. Gould could clearly agree to defend and indemnify Monsanto from "any and all liabilities, claims, damages, penalties, actions, suits, losses, costs, and expenses arising out of or in connection with the receipt, purchase, possession, handling, use, sale, or

disposition of such PCBs...". In so holding, the court held that:

"Such terms clearly and unequivocally provide for Gould to indemnify Monsanto against any and all claims. Thus, the contract terms must be enforced absent a showing of duress, fraud, or undue influence. We find no showing by Gould. Accordingly, this Court is bound to enforce the contract..." Monsanto, 965 S.W.2d at 317.

Likewise, EFCO and Alberici are sophisticated commercial entities. The Trial Court in granting the summary judgment in favor of EFCO found this to be the case. Alberici has been in business for approximately 80 years and is one of the top construction firms in the United States. Joseph Krispin, Vice President of Alberici and Project Manager for the Mart project signed the contract on behalf of Alberici. The size of his projects vary from between \$30 million to \$150 million. Despite these undisputed facts, Appellant's argue that, unlike the Monsanto case, the Lease Agreement it executed with EFCO was not signed as a result of an arms-length negotiation. Appellant alleges that although it is a multi-million dollar corporation, one of the largest construction companies in the country, it had an unequal bargaining position with EFCO with regard to the rental of \$3,000.00 worth of forms. This argument falls flat. Moreover, the Court in Monsanto found that Monsanto "required" Gould to execute the "Special Undertaking" before it would sell PCB's to Gould. Monsanto, 965 S.W.2d at 316. Further, there is no discussion in Monsanto with regard to any "bargained" for negotiations by and between Monsanto and Gould. However, as with Alberici, Gould had the opportunity to read the "Special Undertaking" and to decide whether or not to execute the Agreement as part of the sale of the PCB's. Thus, there is

absolutely no indication that the Lease Agreement was not an arms-length agreement between two sophisticated commercial entities.

Clearly, Mr. Krispin and his company for whom he was contracting were not in an unequal bargaining position. Mr. Krispin was clearly given the opportunity and had the sophisticated commercial background to review and interpret the contract and to determine whether or not he wished to enter into the bargain. More importantly, however, Mr. Krispin does not say that he signed the agreement under duress, fraud, or undue influence. Accordingly, the unequivocal, plain and clear provisions of the agreement were enforceable.

**B. EFCO Is Entitled to Recover Its Costs of Defense Of the Unfounded Claim of Alberici's Employee as EFCO Was Found Not To Be Negligent, And, Therefore, EFCO Is Not Requesting Indemnification For Its Own Negligence.**

It is undisputed that a jury found that EFCO was not negligent and/or liable for any damages to Alberici's employee arising out of the use of the concrete forms. However, EFCO was required to expend substantial monies to defend this "unfounded" claim. (See **LIABILITY** paragraph which provides that Alberici, "...shall also indemnify, defend and save harmless [EFCO] from any such claims, founded or unfounded and whether based upon negligence or otherwise." (emphasis added)). Thus, EFCO is **not seeking indemnity for damages as a result of its own negligence.** Instead, it is seeking reimbursement for defense costs, pursuant to the clear and unequivocal terms of the Lease Agreement, incurred to defend a suit brought by Alberici's employee arising out of Alberici's use of the concrete forms while in Alberici's

sole custody and control. That is precisely the purpose of the bargained for LIABILITY provision of the Lease Agreement that allows Alberici, and other construction companies across the country, to lease concrete forms at lower prices in exchange for Alberici's agreement to defend lawsuits brought by employee's when injured using the concrete forms on the construction site. EFCO would not have leased concrete forms to Alberici for \$3,000 if Alberici had not signed and returned the Lease Agreement agreeing to this provision. This is a clear and unequivocal agreement to shift risks, and it is an agreement that is standard (and necessary) in the construction industry.

Alberici's agreement to defend is separate and distinct from its obligation to indemnify EFCO. As the underlying claim made by Alberici's employee was determined to be unfounded, the issue of whether or not the indemnity paragraph required Alberici to indemnify EFCO for damages as a result of its own negligence is not an issue.

However, assuming arguendo that the indemnity paragraph does not require Alberici to indemnify EFCO for personal injuries as a result of EFCO's negligence, Alberici had a duty to defend such a claim nonetheless. While there appears to be no Missouri case directly on point, one case cited in Appellant's brief squarely addresses this issue. In McNiff v. Millard Maintenance Service, 715 N.E.2d 247 (Ill. 5<sup>th</sup> Dist. 1999), the court found that the indemnification provision did not require the contractor to indemnify the property manager for an injury to the contractor's employee arising out of the alleged negligent acts or omissions of the property manager. Id. at 251. However, the court held that because the injury occurred during the performance of the work, the subject matter covered by the indemnification provision, the contractor had expressly agreed to "protect,

defend, \* \* \* and hold (property manager) harmless \* \* \* from and against any and all claims, actions, liabilities, losses, damages, costs and expenses relating to any and all claims." Id. at 252. The court held that the use of the word "defend" requires a contractor to protect the property manager against the allegations of plaintiff's suit for personal injuries incurred as an employee of contractor in the performance of contractor's work. Id. Thus, the Millard court, under similar circumstances, held that the duty to defend was broader than the duty to indemnify.

The Millard suit involved claims asserted by the injured employee against both the employer and the property manager, in the same suit. In Missouri, an employee is prohibited from filing suit against its employer for personal injuries arising out of and in the course of his work for the employer. See §287.120.1 RSMo. (Supp. 1993). Instead, the employee's sole recourse is to file a claim under the Worker's Compensation Law and, it is undisputed that Alberici's employee did file a claim for compensation and received compensation from Alberici as a result of the injury. The exclusivity provision of Missouri's Worker's Compensation Law precluded Plaintiff from naming and joining Alberici in its suit against EFCO.

The reasoning of Millard, however, is applicable for the proposition that even if this Court finds the indemnity provision does not cover claims arising out of EFCO's own negligence, the allegations of Mr. Stawizynski's suit clearly required Alberici to defend the claim, whether founded or unfounded. In fact, this situation is more compelling than the Millard case because here, the jury conclusively found that Mr. Stawizynski's injuries were caused by his own negligence, or that of Alberici, and were in no way were caused by the

negligence of EFCO. Thus, EFCO's request for defense at the start of the litigation, and its renewed request for reimbursement for defense costs at the conclusion of the litigation, was proper and EFCO is entitled to the costs of defense regardless of whether or not it would have been entitled to indemnification for damages had they been awarded by a jury.

Similarly, in another case cited by Appellants, the Mississippi Supreme Court held that a subcontractor clearly and unequivocally agreed to indemnify and defend a contractor for claims made by a third party alleging acts of negligence against the contractor. Blain v. Finley, Inc., 266 So.2d 742 (Miss. 1969). The court upheld the indemnity argument even though it referred, specifically, only to the negligence of the subcontractor. Id. at 744. Moreover, the court held that because the contractor was ultimately found to be without fault for the injuries of the third person, the subcontractor was required to defend the claim, or to pay defense costs after it was determined that the contractor was not negligent. Id. The court held that this was particularly applicable because the indemnity provisions of the contract specifically refer to the recovery of expenses and attorney's fees expended to defend claims even when the claims are groundless. Id. at 746.

Accordingly, Alberici had an obligation to defend the Stawizynski claim, or to pay the defense costs once the jury found EFCO without fault, notwithstanding whether or not the Lease Agreement would have required Alberici to indemnify EFCO for actual damages caused by EFCO's own negligence.

**C. Enforcement Of The Indemnity Provision In This Situation Is Not In Conflict With Existing Missouri Law.**

Appellant argues that the indemnity provision is a general, broad, and seemingly all-

inclusive provision which is insufficient to impose liability for the indemnitee's own negligence. In its Brief, Appellant relies heavily on this Court's early decisions in Missouri District Tel. Co. v. Southwestern Bell Tel. Co. 93 S.W.2d 19 (Mo. banc 1935), Kansas City Power & Light Co. v. Federal Construction Corp. 351 S.W.2d 741 (Mo. 1961), and the Eastern District Opinion in Pilla v. Tom-Boy, Inc. 756 S.W.2d 638 (Mo.App.E.D. 1988). Admittedly, these cases stand for the general proposition that "mere general, broad, and seemingly all-inclusive language in the indemnifying agreement is not sufficient to impose liability for the indemnitee's own negligence." Pilla, 756 S.W.2d 638, 641 citing Kansas City Power, 351 S.W.2d at 745. Nevertheless, none of these cases are inconsistent with the holding set forth in the Monsanto case that courts will enforce a contract of indemnity between "sophisticated commercial entities" absent fraud, duress, or undue influence. Moreover, these cases precede this Court's decisions of Alack, Malan and Warren, discussed below.

Additionally, in Kansas City Power & Light the indemnity provision reviewed by the Missouri Supreme Court and cited by Appellant in its Brief at p.25 in support of their argument is misleading. Appellant, in its Brief, cited the provision as follows:

"The Contractor...shall indemnify and save harmless the Company...from all suits or actions of every nature or description for, or on account of, damage or injuries received or sustained by any party...in the performance of the work."

(Appellant's Brief, p.25).

Appellant goes on to state that, "This language is fully as broad and all-inclusive as that in EFCO's Lease Agreement. Id. Appellant contends that this Court held that as a matter

of law, the Contractor had not agreed to indemnify the Company against liability resulting from the Company's own negligence. Id. However, a careful analysis of the Kansas City Power & Light case reveals that, in fact, this Court did not hold that this particular provision at issue was simply a broad, general, all-inclusive indemnity provision which was insufficient to impose liability for the indemnitee's own negligence. Instead, this Court determined that the provision specifically required the contractor to indemnify the company for only the contractor's negligence. This is clearly shown by a reading of the entire provision which is as follows:

"Every precaution will be used by the contractor to protect the workmen and others about the premises and the public on the streets, highways, or rights-of-way and he shall indemnify and save harmless the company and its representatives, successors, and assigns from all suits or actions of every nature or description for or on account of damage or injuries received or sustained by any party or parties by or from the contractor, his agents, or servants in the performance of the work." (emphasis added). 351 S.W.2d at 743.

When read in its entirety, the provision does not support Appellant's argument.

Likewise, the next provision cited by Appellant in its Brief from the Kansas City Power & Light case was as follows:

"The Contractor...shall hold and save harmless the Company from, any and all actual or alleged damages, injuries, costs, expenses, suits, causes of action or claims...arising out of or as a consequence of the construction....".

(Appellants Brief, p.25, citing 351 S.W.2d at 743).

However, Appellant has once again omitted key words. A careful reading of the entire cited provision shows that the heading is entitled "Responsibility of Contractor to Private Property Owners...." Even a cursory reading of the language immediately following that quoted by the Appellant demonstrates that this indemnity provision was referring to property damage including but not limited to "standing crops, fields, pastures, roads, or other land...created in the process of construction" Id. at 351 S.W.2d at 743. This Court in its opinion noted that, "[w]e cannot escape the conclusion that this portion of the contract was primarily intended to cover property damage to landowners...". Id. Thus, it was inapplicable to the issue of indemnity for personal injuries.

Accordingly, neither one of these cited provisions in the Kansas City Power & Light case in any way support Appellant's arguments in its Brief. The indemnity provision herein does not limit the scope of the indemnity to acts of negligence of Alberici and its employees. Further, the provision expressly provides for indemnity for injuries to persons or property. Thus, the enforcement of the indemnity provision is perfectly consistent with this Court's early decisions addressing this issue.

**D. Enforcing the Indemnity Provision Is Consistent With the Court's  
Finding That Sophisticated Commercial Entities Should Be Able To  
Freely Contract.**

In Alack v. Vick Tanny Intern. of Missouri, Inc., 923 S.W.2d 330 (Mo. 1996), this Court held that, ". . .clear, unambiguous, unmistakable, and conspicuous language . . ." is required in order to, ". . . release a party from his or her own future negligence." Id. at 337.

In Alack, this Court determined that an exculpatory clause contained in a contract between a health club and an individual was "ambiguous" and, therefore, did not insulate the health club from its own liability for future negligence and further, that it was unenforceable because the exculpatory clause did not use the word "negligence" or "fault". Id. at p. 332. This Court held that the term "negligence" or "fault" or other equivalent must be used conspicuously so that a clear and unmistakable waiver and shifting of risk occurs. Id.

Three Justices of this Court would have upheld the enforceability of the exculpatory clause in Alack. Id. at pp.'s 339-346. Moreover, the majority opinion notes significantly, that:

"This case does not involve an agreement negotiated at arms length between equally sophisticated commercial entities. Less precise language may be effective in such situations, and we reserve any such issues." Id. at p. 338, f.n. 4.

Thus, this Court has suggested that when two sophisticated commercial entities freely contract to shift liability or risks, courts should use a less stringent standard to determine if the indemnity provision is enforceable.

Also, this Court recently reaffirmed the right of a party's freedom to contractually waive the fundamental right to a jury trial. Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624, 627 (Mo. 1997) (contractual waiver of a jury trial contained in a written lease agreement for commercial retail space upheld). This Court concluded that both plaintiff and defendant were commercial entities engaged in a business transaction that, by all appearances, was an arms-length negotiation and, therefore, the waiver of a jury

trial was made knowingly and voluntarily. Id. at 628. Significantly, in reaching this conclusion, this Court noted that other jurisdictions had upheld similar clauses as a "knowing and voluntary waiver", and cited to the case of Leasing Service Corp. v. Craine, 804 F.2d 828, 833 (4<sup>th</sup> Cir. 1986) wherein the waiver was knowing and voluntary when located on the reverse side of a two-page, standardized, fine-print contract. Id. at 628, f.n. 6. (emphasis added).

Applying the principles as set forth in Alack and Malan Realty, it is evident that the indemnity paragraph at issue herein was both clear and conspicuous. The indemnifying paragraph was contained in a two-page Lease Agreement wherein the "LIABILITY" paragraph was a separately numbered paragraph in the Agreement. The indemnification paragraph expressly and unequivocally provides that, "Lessee shall be entirely responsible for and shall pay and exonerate Lessor from liability for damages arising from injury to any persons or property as a result of the use or possession of the Leased Equipment by Lessee . . . Lessee shall also indemnify, defend and save harmless to Lessor from any such claims, founded or unfounded and whether based upon alleged negligence or otherwise." (emphasis added). This indemnity paragraph clearly covered any and all claims with regard to the "use and possession" of the concrete forms delivered by EFCO to Alberici. Further the indemnity paragraph was contained in a Lease Agreement negotiated at arms-length between two sophisticated commercial entities, and executed by the Vice-President of one of the largest construction companies in the State of Missouri. Finally, the indemnity paragraph expressly includes the term "negligence". Accordingly, the indemnity provision would be enforceable even under the "bright-line"

rule established by the majority of this Court in Alack, notwithstanding the fact that a less stringent standard should have been applied by the Court of Appeals in this situation because the parties are two sophisticated entities negotiating at arms-length. Alack, 923 S.W.2d at 338, f.n. 4.

## II.

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO EFCO BECAUSE PARAGRAPH 14 OF THE LEASE AGREEMENT WAS SUFFICIENTLY CONSPICUOUS IN THAT IT IS CONTAINED IN A TWO PAGE CONTRACT, SUFFICIENTLY DISTINGUISHED IN BOLD AND CAPITAL LETTERS, AND THE LEASE AGREEMENT WAS EXECUTED BY ALBERICI'S VICE PRESIDENT WHO WAS PRESUMED TO HAVE READ AND AGREED TO ALL PROVISIONS, AND ALBERICI'S CONDUCT UPON RECEIPT OF THE TENDER OF DEFENSE IS CONSISTENT WITH THE FACT THAT IT HAD AGREED TO ALL PROVISIONS OF THE LEASE AGREEMENT.

### A. Indemnity Provision Was Conspicuous.

Appellant relies heavily on the case of Burcham v. Procter & Gamble Manufacturing Co., 812 F.Supp. 947 (E.D.Mo. 1993) in support of its argument that an agreement to indemnify will be unenforceable unless set out in a conspicuous manner in the contract. Burcham held that the indemnity provision in that case was not sufficiently conspicuous to warrant its enforcement because the provision appeared in small print on the back of a boiler plate purchase order form. The court also determined that it was surrounded by unrelated terms, not highlighted, printed in bold type or otherwise set apart

from the other provisions in the contract. (812 F.Supp. at 948). (A copy of the agreement in Burcham is attached hereto as Resp. App. A3) There is a marked difference between the Burcham agreement and the agreement in this case where the LIABILITY provision is clearly designated.

In order to be enforceable, an indemnity provision must be placed in the contract so that the indemnitor has fair notice of its existence. United States v. Conservation Chemical Co., 653 F.Supp. 152, 235 (W.D.Mo. 1986). In this case the indemnity provision in the Lease Agreement is conspicuous and noticeable. Directly above the signature line where Mr. Krispin signed the Agreement, the contract states, "[t]his agreement is subject to all provisions and conditions on the reverse side including those limiting warranties." Additionally, the reverse side states "WARRANTY AND CONDITIONS (emphasis added) and consists of Paragraphs 9 through 20. The beginning of each paragraph is in larger type and bold, including the one at issue in this case numbered "14. LIABILITY...".

Further, Mr. Krispin acknowledges that he looked at the reverse side of the Lease Agreement, but he claims he did not read it. Thus, Mr. Krispin was clearly given the opportunity to review and revise any paragraph including Paragraph 14 but he failed to do so. When Mr. Krispin signed the Agreement, he was telling EFCO that he accepted all of the terms. The duty to defend is clear and enforceable.

**B. Alberici's Vice-president Executed The Lease Agreement And Was Presumed To Have Read And Agreed To All Provisions.**

It is undisputed that Alberici's Vice-President, Joseph Krispin, signed the contract containing the indemnity agreement and, that Mr. Krispin admitted that the one-page contract contained writing on both sides before he signed it. Thus, as a matter of law, Mr. Krispin was presumed to have read the entire contract, and was presumed to have noticed each provision therein. Warren v. Paragon Technologies Group, Inc., 950 S..2d 844, 946 (Mo.1997). Therefore, Mr. Krispin's signature demonstrates that an agreement was reached with regard to all provisions, including the indemnity paragraph. Id.

In Warren, this Court found that a release of future negligent acts was enforceable even though it was contained in a five legal-size-page, single space form residential release executed by an individual. Id. In Warren, the parties were not of equal bargaining positions, the lessee was not a sophisticated commercial entity, and the lease was a much longer boiler-plate contract. However, this Court found that the Lessee's signature on the form lease was evidence that she had read and noticed each provision in the lease, and that she agreed to each provision including the agreement to release the lessor of any and all liability for the future negligent acts of the lessor. Id.

Alberici's contention (apparently) is that it's Vice-President should be held to a lesser standard than the individual lessee in Warren. This contention is without merit, and Alberici should not be able to avoid its contractual obligations by taking the "head in the sand" defense that Mr. Krispin did not read what he signed and agreed to.

**C. By Its Conduct, Alberici Acknowledged That It Contractually Agreed to Defend EFCO From The Stawizynski's Suit.**

In its brief, Alberici claims its Vice-President did not read the entire Lease Agreement, and did not understand that the Lease Agreement contained an indemnity provision. As set forth above, Mr. Krispin's execution of the Lease Agreement prevents Alberici from avoiding its contractual obligations under the Lease Agreement. Mr. Krispin is presumed to have read all provisions, and is presumed to have agreed to all the provisions contained therein. Warren, 950 S.W.2d at 846.

Moreover, Alberici's conduct after EFCO tendered to Alberici the defense of the Stawizynski suit confirms that Alberici believed and understood that the Lease Agreement obligated Alberici to defend this claim. It is undisputed that EFCO tendered the defense of this claim directly to Alberici. At that time, Alberici did not dispute that the Lease Agreement obligated it to defend this suit; Alberici did not claim that EFCO's tender of the defense was improper; and Alberici did not dispute that it had agreed to defend EFCO from such a claim under the terms of the Lease Agreement. Instead, Alberici forwarded to its insurance company EFCO's tender of the defense.

Alberici's insurance company acknowledged receipt of the request from its insured. Ultimately, it was Alberici's insurance company that denied EFCO's request for defense of the claim. However, this has no bearing on whether or not Alberici contractually agreed to defend such a claim; it only means that Alberici's insurance company would not accept coverage of the claim under Alberici's policy of insurance.

Indeed, Alberici admits that it had no involvement in its insurance company's decision to accept or deny coverage of the claim under Alberici's policy of insurance.

There is a significant distinction here. Had Alberici believed that it had not agreed to indemnify EFCO for this very type of claim, why did Alberici forward EFCO's request for the defense of the claim to its insurance company? If Alberici believed that it had not agreed to such a provision, Alberici surely would have (and should have) immediately disputed EFCO's request for defense under the terms of the Lease Agreement executed by and between EFCO and Alberici. Alberici's conduct in failing to object or dispute the validity of EFCO's request for defense, under the terms of the Lease Agreement, and its conduct in forwarding the claim to its insurance company for coverage, is inconsistent with its position asserted herein that it never agreed to defend EFCO for claims like those asserted in Mr. Stawizynski's suit. Instead, it was only after Alberici's insurance company declined to cover Alberici for such a claim that Alberici, parroting the insurance company's interpretation of the Lease Agreement, attempted to avoid its contractual agreement and obligations.

### III.

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF EFCO BECAUSE PARAGRAPH 14 OF THE LEASE AGREEMENT REQUIRES ALBERICI TO DEFEND EFCO FROM ANY CLAIM, FOUNDED OR UNFOUNDED, AND WHETHER BASED UPON ALLEGED NEGLIGENCE OR OTHERWISE, EVEN THOUGH THE STAWIZYNSKI SUIT SOUGHT RECOVERY FOR A WORK-RELATED INJURY TO AN ALBERICI EMPLOYEE BECAUSE THE MISSOURI COMPENSATION LAW DOES NOT PROVIDE IMMUNITY TO ALBERICI AGAINST LIABILITY WHEN ALBERICI CONTRACTUALLY AGREED TO DEFEND EFCO IF AN ALBERICI EMPLOYEE WAS INJURED WHILE USING THE EFCO FORMS

In McDonnell Aircraft Corp. v. Hartman-Hands-Walsh Painting Co., 323 S.W.2d 788 (Mo.App. 1959), the court held that the non-employer defendant could maintain an indemnity action against the employer of the injured employee on the basis that the employer defendant (Hartman) had breached its express agreement to assume and perform it. In this case, Paragraph 14 of the Lease Agreement clearly imposes upon Alberici a duty to defend and indemnify. In addition to the duty to warn and to instruct employees, Alberici also agreed "to pay and exonerate lessor for liability for damages arising from injury to any person or property as a result of the use or possession of the leased equipment by Lessee, its

agents, employees (emphasis added) . . .". Additionally, Alberici agreed to indemnify, defend, and save harmless EFCO from any such claims, founded or unfounded, and whether based upon alleged negligence or otherwise. As set forth above, this provision specifically requires Alberici to defend and indemnify for any and all claims, including those based on the negligence of EFCO.

Based on the holding in Monsanto v. Gould Electronics, Inc., 965 S.W.2d 314 (Mo.App.E.D. 1998), the Lease Agreement meets the "express agreement" requirements set forth in the McDonnell case. Appellant relies upon Parks v. Union Carbide Corp., 602 S.W.2d 188 (Mo. banc 1980) and several subsequent cases for the proposition that the contract language in this case does not expressly and specifically meet those requirements. However, in Parks v. Union Carbide, there was no particular indemnification clause. The only agreement set forth in the Parks case was an agreement to "warn and supervise its employees". Accordingly, the court held that this clause standing alone did not contain or imply clear and unequivocal terms to indemnify liability due to the indemnitee's own negligence. Parks v. Union Carbide, 602 S.W.2d at 191.

Likewise, in Linsin v. Citizens Electric, 622 S.W.2d 277 (Mo.App. 1981), also relied upon by Appellant, there was no particular agreement either written or oral which would require indemnity by the employer. 622 S.W.2d at 280. Instead, the argument for indemnity was based only on an allegation of a special relationship between Mississippi Lime and Citizens Electric. The court held that this "special relationship" was insufficient to require indemnity. Similarly, in Martin v. Fulton Iron Works, 640 S.W.2d 491 (Mo.App.E.D. 1982), there was only an agreement to "warn and supervise" employees.

Thus, the Martin court held that this was also insufficient to imply a promise to indemnify against another's negligence. There specifically was no indemnification clause in the contract similar to the one in this case.

#### IV.

**THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO EFCO BECAUSE ALBERICI CONTRACTUALLY AGREED TO DEFEND EFCO AND, THEREFORE, MISSOURI COMMON LAW INDEMNITY IN PRODUCTS LIABILITY CASES IS INAPPLICABLE AND FURTHER, ALBERICI FAILED TO ASSERT THE DEFENSE IN THE TRIAL COURT THAT UNDER MISSOURI LAW EFCO, AS A MANUFACTURER, HAD THE DUTY TO INDEMNIFY ALBERICI AGAINST PRODUCTS LIABILITY CLAIMS FOR EFCO'S PRODUCTS AND, THEREFORE, ALBERICI WAIVED ANY SUCH ARGUMENT.**

Alberici contractually agreed to defend and indemnify EFCO pursuant to the Lease Agreement. Parks v. Union Carbide, 620 S.W.2d 188 (Mo. banc 1980) recognizes that a non-employer can enter into an agreement with an employer by which the employer agrees to indemnify the non-employer. Thus, because the indemnity provision is enforceable, common law indemnity is clearly inapplicable.

Appellant argues that Missouri common law would require EFCO to indemnify Alberici against product liability claims because EFCO was the manufacturer of the concrete forms which allegedly injured Stawizynski. Appellant relies upon the case of Palmer v. Hobart Corp., 849 S.W.2d 135 (Mo.App.E.D. 1993), which held that in a

products liability suit a party exposed to liability solely because of its status as a supplier of a product in the stream of commerce is entitled to indemnity from the manufacturer. However, Palmer is clearly distinguishable from the present case. The parties in Palmer had not entered into a contractual duty to defend agreement as the parties have in this case. Absent this type of agreement, the Palmer court properly held that the supplier was entitled to "upstream" indemnification from the manufacturer based on common law. Of course, had the supplier entered into a duty to defend agreement, then the result would likely have been completely different. Accordingly, the common law does not require EFCO to indemnify Alberici against product liability claims because of the agreement which the parties entered into in the Lease Agreement.

It is a fundamental rule that contentions not put before the Trial Court will not be considered by the Appellate Court; and an Appellate Court will not convict the Trial Court of error on an issue which was not put before it to decide. Plank v. Union Electric Co., 899 S.W.2d 129, 132 (Mo.App.E.D. 1995). Alberici failed to raise this issue in the Trial Court. Therefore, Alberici is estopped from raising this issue on appeal.

**V.**

**EFCO DOES NOT ASK FOR THIS COURT TO CHANGE EXISTING  
LAW.**

Appellant correctly states that New York has recognized that the specificity requirement of indemnity provisions is "somewhat liberalized" when dealing with indemnification clauses "negotiated at arms length between . . . sophisticated business entities. Gross v. Sweet, 400 N.E.2d 306, 310 (NY 1979). Indeed, this Court in Alack cited the Gross case in support of its footnote provision indicating that the court reserved for a future date the issue of whether or not a less stringent standard may apply to indemnity agreements negotiated at arms length by sophisticated commercial entities. Alack, 923 S.W.2d at 338.

Plaintiff cites numerous cases from other jurisdictions that purport to establish a "clear and unequivocal" rule for the enforcement of indemnity provisions wherein one party seeks indemnity for damages caused by its own negligence. Although Appellant cites many cases for the proposition, Appellant fails to address the factual scenarios underlying the actual decisions. Indeed, a fair reading of these decisions confirm that the bulk of the cases refusing to enforce the indemnity provisions involve contractual language that expressly limits the scope of the indemnity agreement to the negligence of the indemnitor, its employees or agents. See. Keawe v. Hawaiian Electric Co., Inc., 649 P.2d 1149, 1151 (Haw. 1982); Indiana State Highway Commission v. Thomas, 346 N.E.2d 252, 259 (Ind. App. 1976); State of Delaware v. Interstate Amiesite Corp., 297 A.2d 41, 43 (Del. 1972);

Martin & Pitz Associates, Inc. v. Hudson Construction Services, Inc., 602 N.W.2d 805, 806 (Iowa 1999); Emery Waterhouse Co., v. Lea, 467 A.2d 986, 992 (Me. 1983); Wyoming Johnson, Inc. v. Stag Industries, Inc., 662 P.2d 96, 98 (Wy. 1983). As in Missouri, these indemnity provisions would not be enforceable as the clear intent of the parties is to limit the indemnity, specifically, to the negligence of the indemnitor. See Kansas City Power & Light, infra. Clearly, that is not the situation with the indemnity provision contained in the Lease Agreement between EFCO and Alberici which does not specifically limit the scope of the indemnity provision to claims based on the negligence of Alberici and its employees.

Moreover, as in the Monsanto case, these decisions confirm that an indemnity provision does not need to use any particular phraseology, and does not need to use the term "negligence" to satisfy the "clear and unequivocal" standard. For example, in Oddo v. Speedway Scaffold Co., 443 N.W.2d 596 (Neb.1989), the Supreme Court of Nebraska held that a lease agreement involving the use of scaffolding equipment in the sole custody and control of the lessor required the lessor to indemnify the scaffolding company for injuries arising out of the lessor's use of the scaffolding. In Speedway, the lessor's employee was injured while using the scaffolding and subsequently filed suit against the scaffolding company for negligence. Id. at 600. The employee also named as a party the lessor, pursuant to Nebraska Worker's Compensation law, for the purpose of determining the lessor's subrogation rights, if any. Id. Speedway cross-claimed against the lessor for indemnity under the lease agreement, and the court found the lease agreement obligated the lessor to indemnify Speedway for damages and costs of defense of the employee's claim of negligence against Speedway. The court enforced this indemnification provision even

though the indemnification provision did not use the word "negligence". Id. at 659, 660. As with the Lease Agreement herein, the lease agreement in Speedway contained the indemnity agreement on the reverse side of a two-page form. Id. at 599. Similarly, the court also rejected the lessor's argument that the indemnity provision was unenforceable under Nebraska's Worker's Compensation Act. Id. at 602.

Also, as set forth above, several states have held that the duty to defend claims involving the alleged negligence of the indemnitee may be enforceable notwithstanding the fact that the indemnity provision was not "clear and unequivocal" with regard to an agreement to indemnify against damages awarded as a result of a party's negligent acts. McNiff v. Millard, supra. This is particularly true wherein, as in this case, it is conclusively found that the indemnified party was not at fault. Blain v. Finley, supra.

Finally, even the courts that purportedly ascribe to the "clear and unequivocal" standard have indicated that the primary interpretative guide governing contract construction is to discern the intent of the parties. For example, in Washington Elementary School Dist. No. 6 v. Baglino Corp., 817 P.2d 3 (Az. 1991), the Arizona Supreme Court acknowledged that although it generally followed the "clear and unequivocal" standard, it cautioned that, ". . . a mechanical application of it should be avoided in determining the parties' intent." Id. at 6. (court enforced indemnity provision even though the term "negligence" was not used). Similarly, courts have held that the "clear and unequivocal" requirement is not the only issue in determining the enforceability of an indemnity provision, but that consideration of the entire contract, the circumstances of the parties and the nature of their undertaking may also be considered. See Batson-Cook Co. v. Georgia

Marble Setting Co., 144 S.E.2d 547, 552 (Ga. 1965). Thus, even those states that may follow the strict "clear and unequivocal" standard, this requirement is not read in a vacuum, and may be read in conjunction with other factors, i.e. the parties' position, the purpose of the contract, etc. The application of a "clear and unequivocal" standard does not mean that such a standard would be so inflexible as to ignore the intent of the parties, or to disturb this Court's consistent affirmation of the maxim that parties may freely contract as they see fit as long as their intent is expressed, clearly and plainly in the contract, and as long as there was no allegation of fraud or duress. Thus, Appellant's citation to the treatment of indemnity provisions in foreign jurisdictions is of no support in its attempt to avoid its contractual obligations under Missouri law.

## **CONCLUSION**

For the reasons set forth above, the judgment of the Trial Court granting EFCO's Motion for Summary Judgment, and entering judgment in its favor, should be affirmed.

Respectfully submitted,

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CERTIFICATE REQUIRED BY SPECIAL RULE NO. 1(c)

The undersigned certifies as follows:

(1) To the best of the knowledge, information and belief of the undersigned, formed after an inquiry reasonable under the circumstances, the claims, requests, demands, objections, contentions, and arguments set forth in the attached Brief are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; the claims and other legal contentions therein are warranted by existing law; the allegations and other factual contentions have evidentiary support; and any denials of factual contentions are warranted on the evidence.

(2) The attached Brief complies with the limitations contained in Special Rule No. 1.

(3) The attached Brief contains \_\_\_\_\_ words, according to the word count of the word processing program used to prepare it.

(4) The floppy disk filed herewith has been scanned for viruses and is virus-free.

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Gerard F. Hempstead

IN THE SUPREME COURT OF MISSOURI

Economy Forms Corporation,	)	
	)	
Plaintiff/Respondent	)	
	)	
v.	)	No. SC83385
	)	
J. S. Alberici Construction Co., Inc.	)	
	)	
Defendant/Appellant	)	

CERTIFICATE OF SERVICE

Gerard F. Hempstead, being duly sworn, on his oath states that on the 30th day of April, 2001, he hand-delivered two copies of the foregoing to: Mr. David G. Millar, 230 S. Bemiston Avenue, Suite 1110, St. Louis, Missouri 63105.

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Gerard F. Hempstead

Subscribed and sworn to before me this 30th day of April, 2001.

My commission expires: \_\_\_\_\_.

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Notary Public

## **APPENDIX**